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CASES CITED.

AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

JOHN HORSTMAN COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 26

NATRON SODA COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 32

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT OF FACTS.

These two cases, being similar in principle and arising out of substantially the same state of facts, were argued together in the Court of Claims and are therefore grouped as one case in the present brief. With some unimportant modifications which, with one exception hereinafter noted, do not affect the principle involved, the findings of fact in both cases by the Court of Claims are identical. Thus, the third, fourth, fifth, sixth, seventh, eighth, and tenth

findings are in identical language. The only important difference between the two cases arises in the ninth finding in the Natron Soda Company case, which discloses that if that Company had under other circumstances any claim against the Government, it had, through its predecessors in title, expressly waived it. This will be explained in detail presently.

The findings of fact, which are common to both cases, show that in the year 1906 the United States, under the authority of Acts of Congress, entered upon the construction of a great irrigating system, called the "Truckee-Carson Project," whereby it was sought to bring the waters of the Truckee River by canal to the Carson River, there impound them, and by means of lateral canals to irrigate a large section of arid land which it was contemplated would amount to two hundred thousand acres. These works were to be constructed in an arid area, known as the Carson Sink Valley, a depression in the earth's surface covering many thousands of acres and which was during a past geologic age the bottom of an inland sea, still called Lake Lahontan.

The drying up of this lake, through centuries of geologic change, modified the topography of the country, which was composed of sand, clay, silt, cinders, and other forms of disintegrated rock substance, and in places these changes had become solidified into stone or consolidated into compact, impervious areas of various sizes and shapes, called

playas. Fissures and cracks exist throughout the mass, but are not uniform. (Finding III.)

Through this large area the Carson River runs. About two miles from one point of the Carson River there are two volcanic craters forming an inverted conical depression, with a rim rising from eighty to one hundred feet above the floor of the valley, which was the bed of the dried up Lake Lahontan. The accumulation of water in these two dead craters caused little bodies of water, one of which was known as Big Soda Lake (owned by the Natron Soda Company, one of the appellants), and the other was called Little Soda Lake, which was owned by the other appellant, the John Horstmann Company.

The only known source of water supply for these bodies of water were small springs, which seeped into the lake and which were thus supplied by the seepage from the Carson River, which was about two miles from the soda lakes. (Findings III and V.)

In the construction of the irrigation system the United States constructed three canals, which passed "within two miles" of the two lakes. (Finding VII.) Upon the shores of these two lakes the two companies had constructed a plant for the extraction of soda from the waters, and these plants had been operated with profit for some years prior to the construction of the irrigation project.

Some months after the construction of the irrigation system an abnormal rise of water was noted in the above lakes. It steadily rose from 1906 to 1916,

and in that period the level had risen nineteen feet (Finding VIII), or an average of a little less than two feet a year. The result of this rise of the water was the flooding of the appellants' plants and the destruction of their business.

These are the basic facts in the controversy as found by the Court of Claims, and the important distinguishing feature, so far as the facts of the cases are concerned, between them is the one to which I have already referred. In the Natron Soda Company case, it appears that its predecessors in title had entered into an agreement with the Government to grant a right of way through their lands for the purpose of constructing a part of the said irrigating system. This contract recited:

> The first party, in consideration of the benefits to be hereafter derived from the construction of irrigation works through or in the vicinity of the lands hereinafter described, agrees that the second party (the United States) may enter on, survey for, grade, and construct canals or ditches upon or across the lands of the first party.
>
> It is further agreed that in consideration of the premises the first party hereby releases the second party from all claims for damages for entry, survey, or construction of said works. (Finding IX.)

Pursuant to this contract, a deed was made for the right of way; but it did not contain the provisions above quoted.

Two other differences between the two cases remains to be noted.

The first is the apparent divergence in the nature of the respective claims as suggested in the two petitions.

In the Horstmann Company case the claim was apparently based upon the negligence of the Government in the construction of the irrigation plant, for it contained the following averment:

> That none of said canals and ditches of said irrigation project for carrying and which did carry said water, as aforesaid, and which surround said "Little Soda Lake," are lined by brick, cement, or other substance or material, but were made or constructed by merely digging out the earth, thereby forming a canal or ditch in the earth; that the water as it flows through the said canals or ditches seeps and percolates through the sides and bottom of said canals and ditches and through the adjoining soil to and into the said "Little Soda Lake," as the said "Little Soda Lake" is the lowest point and the point to which water would naturally flow underground from said canals and ditches by reason of the character of the seams or strata of the soil lying between the said canals and ditches and said "Little Soda Lake."

Paragraph XIV avers—

> that owing to the said porous condition of the soil in said canals and ditches, and generally in that vicinity, as aforesaid, *and the lack of proper lining in said canals and ditches, and*

> *owing to the way said canals and ditches were built,* and also to the natural condition existing as aforesaid, by reason of which water would flow from said canals and ditches to and into said "Little Soda Lake," the said water was permitted by the said United States Government and the said departments and officers thereof to and did seep and percolate through the said canals and ditches and through the seams or strata of clay and sand underlying the same into and on the said "Little Soda Lake."

This apparently based the claim of the Horstmann Company upon a tort; and if so, the plaintiff has put himself out of court, for the Court of Claims has no jurisdiction in cases arising out of tort, as the Government has never waived its immunity from suit in such cases.

In the Natron Soda Company case no such claim of negligence was made; but the claim was based upon a constructive "taking" by the Government of the appellants' plant for public purposes. In neither case is it suggested that the Government intentionally or consciously took the appellants' properties, respectively. The effect, if any, which the construction of the irrigation plant had upon the level of the waters of the two lakes was not contemplated, either by the Government's engineers or by the appellants. Nor was the gradual change in the level discovered by either party to the controversy for many months thereafter. The operations of the irrigation system, after some preliminary trials, were commenced in

August, 1906, and it was not until the spring of 1907 that the appellants discovered that from some cause the waters in their lakes, respectively, were rising.

In both cases the sole basis of the claim is the allegation that the construction of the irrigation plant did cause the rise in the water level of the two lakes and the consequent destruction of the appellants' plants. Unless that fact was established, the plaintiffs concededly have no case; for it is not pretended that the Government, either by express contract or by formal taking, or by any other implication, ever appropriated the appellants' property. As already stated, the nearest approach to the lakes of any of the Government canals was two miles.

The *second* difference between the two cases is that in the Horstmann case the plaintiff, despairing of any further attempt to induce the Court of Claims to find the basic cause of causal connection in his favor, is content to rest his case upon its negative finding that the real cause of the rise of waters in the soda lake is unknown and unknowable. This is as courageous as if a theatre manager were to put the play of Hamlet on the stage without the character of Hamlet in the *dramatis personae*.

In the Natron case, however, counsel recognizes the insufficiency of this negative finding and virtually seeks a new trial by asking this court to direct the court below to review its findings and include therein the ultimate and basic fact as to the real cause of the soda lake's rise in level. By his motion to remand he also seeks to reform the contract whereby his

predecessors in title expressly released the Government from any claim for damages by reason of the construction of the irrigation system.

Not content with this, he asks further findings as to the amount of damage that he claims to have sustained.

In his brief, he recited such portions of the testimony as he thinks supports the findings, which the Court of Claims, upon a consideration of *all* the testimony, refused to make; but it is obvious that as this testimony is not before this court it can not determine whether the Court of Claims was right or wrong in its findings of fact.

Counsel for the Natron Company says (p. 10):

> The first issue is: Was the destruction of the value of claimant's property caused by the Government? This is a clear issue of fact. If the injury was not caused by the Government, then, of course, there would be no liability.

Having thus stated the basic issue, he continues (pp. 10–11):

> An examination of the findings of fact as made by the Court of Claims will disclose immediately that there is no finding at all of the court upon the first and most essential question of fact, and without such finding, or a finding of all the circumstantial facts established in evidence bearing upon said question, the case can not be presented to this court.

Again he states (pp. 11–12):

> Yet, there is nothing whatever in the findings of the Court of Claims to show that this

> was caused by the works of the Government, and in fact finding (V) to which claimant has always strenuously objected and which is inconsistent with the other findings) gives the inference that there is nothing in the evidence to show that the rise of the water was caused by the Government work. The court states in this finding:
>
> "Percolating waters are hidden and invisible. It does not appear from the evidence how they are governed, or how they move under ground. The slope of the Carson Valley is in a northeasterly direction."

He therefore declines to produce Hamlet without the character of Hamlet.

I agree with the counsel for the Horstman Company that this court should not remand a case to the lower court with instructions to find a fact which that court was unable to find.

I also agree with counsel for the Natron Soda Company that the failure of the Court of Claims to find this basic fact is fatal to recovery.

The burden of proving such causal connection was upon the appellants, as plaintiffs in the court below, and it is their misfortune that they were unable to satisfy the Court of Claims that the United States Government, in the manner indicated, had caused the changes in the water levels of the two lakes. It is true that the court did not find affirmatively that the causal connection did not exist. Its decision was the Scotch verdict of "not proved." Obviously this failure to find the fundamental question of fact was

not an oversight, for after the first findings of fact were made applications were made for their amendment, and, while they were in unimportant respects amended, yet the court in its amended findings of fact still refused to find that the United States Government had caused the submersion of the appellants' property. Obviously, having regard to the volcanic nature of these crater lakes and the geological formation of the surroundng country, with its subterranean fissures and cracks and its porous soil, the court still concluded that, especially in a country of this character, the subterranean currents of water were like the ways of Providence, "mysterious and past finding out."

The opinion of the court delivered in the Natron Soda Company case, but which obviously represented the court's views with reference to the Horstmann Company case also, make this attitude of the court clear beyond doubt. The court said:

> Percolating water is a hidden, invisible thing. How it moves is more a matter of conjecture than knowledge—of inference rather than proof. It would seem impossible to apply any law, beyond the general principle of reasonable use of one's land, to such a hidden and formless thing. (Weil on Water Rights, vol. 2, p. 1093.) It seems, therefore, that the existence, origin, movement, and course of underground waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect

> to them would be involved in hopeless uncertainty, and would be practically impossible, because any such recognition of correlative rights would interfere to the material detriment of the Commonwealth with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building and general progress of improvement in works of embellishment and utility. (Angell on Watercourses, 7th Edition, 171.)
>
> It seems to us that while the property of the plaintiff *may* have been destroyed by the irrigation system of the Government, yet the influences which have brought about this destruction are so secret, changeable, and uncontrollable that we can not subject them to the regulations of law, nor build upon them a system of rules as has been done with streams upon the surface; so that *if* the plaintiff has incurred a loss from the movement of these underground waters in this valley it is *damnum absque injuria.*

In the court below, in the Horstmann Company case, no further attempt was made to induce the court to change its findings of fact, but in the Natron Soda Company case the appellant, fully realizing that it had failed to establish its fundamental averment of fact, again urged the court to amend the findings of fact—

> (1) So as to show the ultimate facts as to the cause of the rise of water in Big Soda Lake and the inundation of the adjacent land which resulted in the destruction of the

plaintiff's property, or (2) by setting forth what the plaintiff asserts are "the circumstantial facts" shown in the evidence as to the cause of the rise of water in Big Soda Lake and as to the value of the property of the plaintiff.

In denying this motion, the court replied:

> In the case at bar the court has found the facts as they are established by the evidence, and has included in its findings all the facts *established by the evidence which "have been proven and which are material to the due presentation of the case of the plaintiff."* It will not be asserted that under rule 5 quoted above the plaintiff or defendant can of right have included in the findings of fact evidence of facts which he may assert to be facts established by the evidence. In other words, the rule can not be construed to mean that this court must include in its findings any evidence which the parties may ask to have included therein upon the mere statement that such evidence is a fact proven. This court in the last analysis must determine what are the ultimate facts which the evidence establishes. (*McClure* v. *United States*, supra.) If it was left to the parties to say what the findings of the court must include it is obvious that the findings of the court would no longer contain facts established by the evidence in the nature of a special verdict, but would be made up of all the evidence in the case and would impose upon the appellate court all the functions of a jury.

In concluding the opinion, the court again said:

> This court has found those ultimate facts and has put into the record every fact which the plaintiff has proved and which is material to the due presentation of its case.

As it can not be contended that the fact of the causal connection between the construction of the irrigation system and the overflow of the Soda Lakes was not material to the appellant's case, it is obvious that the court, in denying the motion to amend their pleading, again expressed the opinion that the appellants had not proved as a fact such causal connection, and that in the absence of such proof, the court was powerless to make such a finding.

I recognize that, in the three cases cited by counsel for the Natron Soda Company in his brief (p. 12), this court has, in exceptional circumstances, remanded a case to the Court of Claims to make a specific finding; but in none of those cases was the finding the ultimate issue of fact, and in none of them did the Court of Claims indicate that, in its judgment, no satisfactory proof had been offered of the existence of the fact by the party upon whom was the burden of proof.

Thus, in *United States* v. *Adams* (9 Wall. 661), the Government was suing to recover certain moneys. A question arose whether a certain formality had been observed, and the Court of Claims apparently deemed it immaterial. Subsequently, the Supreme Court decided that it was material, and thereupon the Supreme Court remanded the case for a specific

finding of a fact which had been ignored through a mistaken interpretation of the law.

In *United States* v. *Pugh* (99 U. S. 265) no motion to remand appears to have been made, and the court simply decided that, where the Court of Claims has found all the facts, the ultimate *legal* effect of those facts was a legal question, and therefore open for review on appeal.

In the third case, *Ripley* v. *United States* (220 U. S. 491), the plaintiff had sued the United States for a breach of contract, and the ultimate fact was whether the Government had broken the contract. Incidentally, there was an issue of fact as to whether the Government inspector had acted in good faith, and the real question was whether a certain finding by the Court of Claims found affirmatively or negatively this issue of fact. This court held that, as the language of the Court of Claims was so ambiguous as to be consistent either with the inspector's good or bad faith, the case should be remanded. The good faith or bad faith of the Government inspector, while a material element in the case, was not the ultimate fact, and the case was remanded because the Court of Claims had apparently preferred to evade the question by resorting to equivocal language which would justify either construction.

These are the only cases which the industry of opposing counsel has found to establish the right to remand; and it is apparent that they differ widely from the instant case.

In the case at bar, the ultimate fact and the very foundation of the plaintiff's claim was that the Government, by constructing the irrigation project, had caused the submergence of plaintiff's soda plant. The burden of proving this was manifestly on the plaintiff. The plaintiff offered all the testimony in support of the affirmative that he could, and, on the argument and reargument, insisted that the Court of Claims find as a fact what was the cause of the rise in water in these soda lakes. The Court of Claims, having considered all the testimony and without in any sense ignoring so obvious an issue of fact, confessed its inability to determine what was the cause, and contented itself with a finding that the cause was unknown and unknowable. This being the case, the court could not find the negative fact that the Government's irrigation project did not cause the injury complained of; nor could it find the affirmative fact that it did.

In effect, the court said: "We do not know what caused the change in the level of the lakes," and this is the best conclusion, after the most elaborate argument and the most patient consideration of the conflicting testimony, that it could reach.

Clearly, therefore, it would be nugatory to remand this case to the Court of Claims, with instructions to find an alleged fact which that court has twice declared its inability to find, either affirmatively or negatively.

If this case should be remanded, and assuming—as is wholly probable—that the Court of Claims would

not change its mind with respect to the probative force of the testimony, it could only reply, as in effect it has already done, that the plaintiff has failed to establish the ultimate fact that the construction of the irrigation project caused, by the seepage, the rise in the level of the lakes, and that it did not know what had taken place in the subterranean depths of this volcanic region.

If the Court of Claims should find that, after an examination of all the scientific testimony, it was ignorant as to the true cause of the periodic volcanic eruptions of Mount Vesuvius, would this court attempt to compel it to assume knowledge where it found itself unable to have knowledge?

II.

NATRON SODA COMPANY'S MOTION TO REMAND.

So fatal to the appellants' case is their failure to establish that the construction of the irrigation system had any effect, direct or indirect, upon the rise of the water levels of the Soda Lakes that the counsel for the Natron Soda Company next makes an effort to induce this court to compel the Court of Claims to find a fact which it has already twice confessed its inability to find from the testimony. It would be idle to ask the lower court to find either that the construction of the irrigation system did cause the damage complained of, or that it did not; for the court has already deliberately concluded and reaffirmed its conclusion, after due con-

sideration of all the testimony, that the operation of subterranean currents is not susceptible of proof, or at all events was not proved by the plaintiff below.

In this, it only followed a like conclusion of this court, which, in the case of *Kansas* v. *Colorado* (206 U. S., 46), said, at page 107:

> Indeed, the extent to which seepage operates in adding to the flow of a stream, or in distributing water through lands adjacent to those upon which water is poured, is something proof of which must necessarily be almost impossible. We may note the fact that a tract, bordering upon land which has been flooded, shows by its increasing vegetation that it has received in some way the benefit of water, and yet the amount of the water passing by seepage may never be definitely known. The underground movement of water will always be a problem of uncertainty.

The motion to remand in the Natron Soda Case is unusual and must be treated as a motion in the nature of *a motion for certiorari* to cause the lower court to make further findings on the theory of a diminution of the record.

This can not now be entertained for the following reasons:

(1) Rule 14, of the Rules of the Supreme Court, expressly provides that "*all motions for certiorari (for diminution of the record) must be made at the first term of the entry of the case; otherwise, the same will not*

be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay."

See also *Chappell* v. *United States* (160 U. S. 499, 506).

Both of the above cases were docketed at the October, 1919, term of the Supreme Court, the *Horstmann* case on January 14, 1920, and the *Natron Soda* case on February 12, 1920, and, unless counsel can show some satisfactory reason for the delay in presenting the motion, it will be denied.

(2) A motion to remand could not change the ultimate conclusion of the lower court as to the basic issue of fact. It could only bring up the evidence. The lower court in refusing to state the evidence has simply obeyed the rules of the Supreme Court which provide as follows:

> In all cases hereafter decided (after 1866) in the Court of Claims, in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record *and none other*:
>
> 1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.
>
> 2. A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, *but not the evidence establishing them;* and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and

conclusions of law to be certified to this court as a part of the record.

(3) The Supreme Court has declared that "the findings of the Court of Claims in an action at law determine all matters of fact precisely as the verdict of a jury" (*Stone* v. *United States*, 164 U. S. 380, 382; *Brothers* v. *United States*, 250 U. S. 88, 93), and it would seem inconsistent that the Supreme Court would go behind the findings of the Court of Claims in these cases, look at the evidence, and then determine that the latter court should have made different findings.

A motion to remand, therefore, would be a nullity. The Court of Claims has confessed its inability, upon the evidence, to determine the cause of the rise of the waters in the Soda Lakes, and this notwithstanding careful and able arguments and rearguments by appellants' counsel to induce the court to make such finding. In this it has only accepted the conclusion of this court in Kansas *v.* Colorado, *ante*, p. 17. If the failure of the Court of Claims to find the causal connection were an oversight—which is inconceivable—a motion to remand might be proper; but such a motion could only operate to require the lower court to guess where they have solemnly decided that it was impossible to guess.

This inability on their part to know the unknowable is easily understood. Granted that the reclamation project brought a large supply of additional water to the Carson River, it was thereupon conducted by the irrigation canals to a thousand different points

in an area of one hundred thousand acres and slowly percolated the soil. Its nearest point to the Soda Lakes was two miles, and it is obvious from the extent of the area that the furthermost point of possible contact was many miles. The region is volcanic in character, and what subterranean currents there may be, neither the eye nor the knowledge of man has yet revealed. Possibly some new geologic change has taken place, which may account for the rise of the waters, or if seepage from the nearest canal accounts in part for the rise of water, who can say what other hidden streams have contributed? Obviously, the change in the water level of the Soda Lakes may be due either to—

(1) seepage from the Carson River, or

(2) from the canals of the Truckee-Carson project, or

(3) from the irrigated lands of the Truckee-Carson project, or

(4) from other sources or conditions, of which we know nothing.

Any or all of these may have caused the rise in the subterranean ground-water plane. The burden was upon the plaintiffs below to prove the cause, and they have no right to demand that the Government or any of its courts shall guess at the cause.

III.

ARGUMENT.

Let us assume, however, that we are wrong in our previous contentions, and that this court is prepared

either itself to draw an inference as to the true cause of the damage, or that, on further proceedings, the Court of Claims had found affirmatively that the seepage from the Government's canals had caused the damage in question.

Would it follow that the appellants could recover? No pretense is made of any express contractual liability by the Government. It never intentionally caused the damage, nor did it in any manner agree to compensate the plaintiffs for such damage. A contractual liability, therefore, in the strict sense of the term, is not and could not be suggested.

Still less could the plaintiffs recover under the theory of a tort, for three obvious reasons. In the first place, the court has affirmatively found in both cases that the Government was not negligent. In both cases there is the express finding that "No negligence on the part of the defendants is alleged or proven in the construction or operation of the canals of the project." (Horstmann Company case, Finding X; Natron Soda Company case, Finding XI.)

We have already shown that as to the Horstmann Company case the pleadings show that there was an averment that the irrigation works had not been properly constructed (*ante*, pp. 5–6); but this theory, if not now disclaimed, has been negatived by the Court of Claims. We have, therefore, a case wherein the Government, for a great public purpose, to benefit thousands of people, at its own expense constructs a public improvement in a careful and workmanlike manner. Nothing that it could do to prevent this or any damage was left undone.

Secondly, even if this court could conclude, in the teeth of this finding, that the construction of this irrigation plant, with its alleged consequences to the plaintiffs, was a tortious misuse of Government property, the conclusion would still remain that no suit could be maintained, as the Government has never given consent to such a suit and has expressly withheld from the Court of Claims any jurisdiction to entertain a case which is based upon an allegation of a tort.

The only remaining theory—and it is the one upon which the appellants will rely—is that the careful and skillful construction by the Government of its irrigating system was a constructive "taking" of the plaintiffs' property, and therefore the Government impliedly contracted to compensate the plaintiffs for their property thus appropriated.

In considering this question, three things must be remembered:

(1) That the alleged results of the Government's acts were, at the time the acts were done, unknown and unknowable.

There was therefore no conscious and deliberate appropriation of appellants' property.

(2) That the Government's acts were done at a distance from the appellants' property, which was, at its nearest, two miles away, and, at its farthest point, many miles more.

(3) That if the operation of the Government's plant injured the appellants' property, it was not immediate, and, as such, readily perceived, but that

it was so slow and gradual that it was not until nearly nine months later that either the Government or the appellants could see what is alleged to have happened.

Under these circumstances, can it be said that, under any decision of this court, there has been such a conscious and intentional "taking" of appellants' property as to imply a contract on the part of the Government, first, to appropriate plaintiffs' property, and then to compensate them for it?

This court has gone far in depriving the Government of its immunity from suits sounding in tort under the theory of an implied "taking," but it has never yet said that the Government could, in a constitutional sense, be said to have taken property where it was not only not conscious of such taking but, in the nature of the case, could not have been conscious at the time the acts were done.

IV.

THE AUTHORITIES.

The chief reliance of the appellants is upon the case of *United States* v. *Lynah*, decided in February, 1903 (188 U. S. 445). In this famous case the court, divided four to three, held that where the Government constructed an embankment along the Mississippi, whose *direct, certain, immediate, and necessary effect* was to cause an overflow upon the lands of the plaintiff in that case, there was a "taking" within the fifth amendment of the Constitution.

I accept the decision in that case and am not seeking that its doctrine should be modified, except in so far as this court itself in later cases restricted its application to similar facts. Unquestionably the Government may manifest its purpose to appropriate property by its acts, as well as by its words. For example, if the Government desired to tear down a building and it was obviously necessary to use the adjoining land for the *débris*, it would not matter whether the Government first appropriated the adjoining land by formal proceedings, and then tore down its building, or whether it first tore down its building and covered the adjoining land with the *débris*. In either case the formal verbal avowal of an intention to appropriate, or the direct appropriation by the necessary results of unequivocal acts, amounts to the same thing. It was obvious that in the Lynah case, the *direct, certain, immediate, and necessary result* of the construction of the embankment was the overflow of Lynah's land. And, from the essential nature of the act, this court drew the reasonable inference that the Government intended to overflow Lynah's lands, and thus to appropriate them. There was a direct connection between the Government's operations and the claimant's lands, both with respect to space and time.

In the cases at bar, however, all these elements are absent. It cannot be said that, when the Government undertook to construct this irrigation plant, the overflow of plaintiffs' works was so direct, immediate, and inevitable as to suggest a conscious

and deliberate appropriation by the Government. In a word, the distinction which must exist between these cases of a true "taking," on the one hand, and the indirect and unascertainable consequences of a lawful act on the other must lie in an intention to take, whether that intention be expressed or implied.

There must be an intention on the part of the United States, either expressed or implied, to take the property of another before there can be any implied promise to pay or contract liability incurred. This liability may be inferred where the results naturally and indubitably flow from the act or effect of the act and may be definitely ascertained or determined. In this case it was impossible for the United States engineers who laid out this irrigation project to have ascertained or determined what effect the irrigation of these lands would have upon the waters of Big and Little Soda Lakes. What part of this water brought in by the irrigation project, if any, would find its way into the lakes was impossible to determine. This being true, the effect was impossible to ascertain, there clearly being no intention on the part of the United States to take the property of the plaintiff, there would be no implied promise to pay for the same. This proposition is very clearly stated in the opinion written by Judge Downey in the Stockton Flood cases, No. 32914 (p. 26):

> The intention, of course, need not be expressed. It may also be a matter of implication, but it must be fairly inferable from all the circumstances. The inference may be

> justified when the taking by an overflow is the natural, known, or easily to be ascertained result of the governmental enterprise. As in the case of a dam across a stream erected to create a pool above, the land, if any, which will be overflowed thereby is easily and accurately to be ascertained, and before, by modern engineering methods, as easily as after the erection of the dam, and such a certain, known, or easily ascertained result can be presumed to have been intended; but eliminate such conditions and substitute an entirely unanticipated result of an authorized Government work, a result not susceptible of advance ascertainment, and perhaps due also to abnormal and unanticipated conditions, and there is no room for an implication of intention. And if the implied contract must arise out of the intention, express or implied, to take, coupled with Constitutional obligation to pay, it must fail for want of an essential element.

This opinion also cites the case of *Tempel* v. *United States*, 248 U. S. 121. The United States, in aid of navigation, had done dredging in the North Branch of the Chicago River in what was supposed to be the natural bed of the river, or at least by dedication or in some other manner a part thereof, but where in fact the stream had been widened by the plaintiff's lessee, for his own purposes, by the dredging out of a part of plaintiff's lands and submerging it to a considerable depth. The Government in prosecuting its work had no knowledge that it was dredging plain-

tiff's land. Plaintiff first demanded possession of that part of the submerged land which had formerly constituted a part of his upland, and this demand being refused he instituted a suit to recover the value of that which he claimed had been taken by the Government. Here there was a direct invasion of the land in question, and the intention was, of course, to do the very physical thing that was done, but the court said, "If the plaintiff can recover, it must be upon an implied contract," and, holding it unnecessary to determine whether or not the Government's claim of a property right in it was well founded, it said:

> The mere fact that the Government then claimed and now claims title in itself and that it denies title in the plaintiff prevents the court from assuming jurisdiction of the controversy. The law can not imply a promise by the Government to pay for a right over, or interest in, land, which right or interest the Government claimed and claims it possessed before it utilized the same. If the Government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort, and for such the Tucker Act affords no remedy. (Citing *Hill* v. *United States*, 149 U. S. 593.)

And in concluding the opinion the learned justice says:

> The facts preclude implying a promise to pay. If the Government is wrong in its contention, it has committed a tort.

In this case, as the effect of the irrigation project on the waters of Big and Little Soda Lakes was impossible of determination, there could not have possibly been any intention to take, and therefore there being no intent on the part of the Government to take the plaintiff's property no implied promise to pay for the same could possibly arise.

This same principle was followed in the case of *Alfred J. Bothwell and the Bothwell Company, a corporation, appellants*, v. *United States* (254 U. S. 231). Appellants owned a tract of land lying in the Sweetwater Valley, Wyoming, and were engaged in the business of cattle raising. The United States constructed the Pathfinder Dam under the Reclamation Act of June 17, 1920. This arrested the flood waters and caused an inundation of the lands. The hay was destroyed and it became necessary to remove the animals and sell them at prices below fair value. The value of the land was ascertained and paid but the court denied appellants' claim for losses consequent upon the forced sale of the cattle and destruction of the business. No appeal was taken. The present suit was instituted to recover for the items so disallowed. The court below gave judgment for the value of the hay only and the cause is here upon plaintiff's appeal. The court said:

> In the circumstances supposed there might have been a recovery "for what actually has been taken, upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and terms of the fifth

amendment so require." (*United States* v. *Cress*, 243 U. S. 316, 329.) But nothing could have been recovered for destruction of business or loss sustained through enforced sale of cattle. There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation.

The decision of this court in *United States* v. *Lynah* caused consternation in Government circles; for it seemed to constitute a serious barrier to the construction of great public improvements. For this reason, it should not be extended beyond its reasonable scope. An extension of the rule could only operate to deprive the Government of its immunity from suits sounding in tort; for it would mean that, to the extent that any public improvement, whether carefully or negligently constructed, caused indirect and remote damage, the property thus damaged was "taken" for public use, a proposition which would be obviously absurd.

And yet the decision in the Lynah case did encourage many such claims against the Government; but in all such cases the claimants found that this court was indisposed to extend the doctrine of the Lynah case and would restrict it to cases where the Government so immediately, directly, and indubitably destroyed the works of a citizen as to result in a true "taking" of his property.

It seems enough to refer to some of the later cases that were held similar in their facts.

Take, for example, the case of *Bedford* v. *United States*, 192 U. S. 217, which was decided about eleven months after the Lynah case, and in which this court reviewed its former decision. In that case, the Government had constructed certain revetments along the banks of the Mississippi, in order to prevent the erosion of the banks by the waters, near the city of Vicksburg. The construction of these revetments caused a change in the course of the river, which in turn resulted in the overflow of a riparian owner, who thereupon sued and invoked the doctrine of the Lynah case. This court, however, held that there was no taking, and that the plaintiff was without a remedy. It held that the Government could not be prevented or embarrassed in protecting one riparian owner because the nature of its work might cause such change in the river as to injure another riparian owner. In all such cases, the Government, under its power over the navigable rivers of the nation, had a right to determine what was due to the interests of all riparian owners and to the public in general.

So, too, in the case of *Jackson* v. *United States*, 230 U. S. 1, where the United States Government constructed a system of public works for the purpose of so confining the waters of the Mississippi River between lines of embankments of levees, as to give increased elevation and velocity and force to the current, in order to scour and deepen the channel. This was alleged to have caused an increased and abnormal elevation of at least four feet to the waters of the river at the high water or flood stage, and to cause the

waters to back up and overflow the lands of the plaintiffs and to destroy their crops and to render their lands unfit for cultivation. In this case, the court said, at page 23:

> It is to be observed that even if all the previous considerations which we have stated concerning the nonliability to result from building levees, measured by the right of an individual to build a levee to prevent the water of a river from overflowing its banks and destroying his property, be put out of view, and the case therefore in all its aspects be tested by the scope of the governmental authority possessed by the United States, the absence of merit in all the claims is too clear to require anything but statement. We say this because the plenary power of the United States to legislate for the benefit of navigation and to construct such works as are appropriate to that end, without liability, for remote or consequential damages, has been so often decided as to cause the subject not to be open.

These cases, where the Government acts as a common protector of all rights, are very much in point in the cases at bar. Here was a vast stretch of arid land that was of no use to anyone. If it could be reclaimed, it could be made a source of great wealth to those who would cultivate it and to the world which would enjoy its products. Thus, countless thousands were to be benefited by the public spirit of the Government in furnishing the money to bring water to a vast area of two hundred thousand acres, which, without such water was an arid desert, and

with it, a bountiful garden. If the Government, in undertaking this important, public-spirited work, were obliged to compensate every one who might in some indirect and unascertainable way sustain some damage, it may be questioned whether the reclamation project would ever have been undertaken. Whose rights were to be considered? Those of thousands who sought arable land, or the few who might suffer? Once again, as in the case of the Mississippi River, the Government, as the common protector of all, was justified in doing that which was for the greatest good of the greatest number, and in doing so, it ought not to be penalized.

Plaintiffs had no vested right in the maintenance of the existing water table in the Carson Valley as of 1906. There seems to be no question as to the right of the Government to build and operate this irrigation project, and also that the Government would not incur any greater liability on account of seepage from canal than would an individual or corporation. If this land had been owned by a corporation and the corporation had constructed this irrigation project instead of the Government and the same results followed, would the plaintiff in this case have had a cause of action against the corporation? The Government certainly does not incur any greater liability than an individual or corporation for the same acts, and it can hardly be contended that the plaintiffs had such a right in the waters of Big and Little Soda Lakes as to stop the march of civiliza-

tion and development of this vast area. See *Jackson* v. *United States*, 230 U. S. 1, 20.

It certainly can not be contended that the development of this vast area should be perpetually held up in order that the density of the solution of soda found in the waters of these lakes might not be lessened, or the level of the water in the lakes raised.

V.

The Government has no greater liability for consequences due to the construction of its works than an individual would have who constructed similar works. Indeed, it is less; for an individual is not immune from suit if such construction tortiously injures the property of another, whereas the Government has such immunity.

If a private corporation had constructed and maintained these canals under the Carson-Truckee project, and this private corporation had been the defendant in these cases, it would not have been liable to the claimants; therefore the Government is not liable, as the fifth amendment to the Constitution was not designed to place a burden on the Government not resting on private corporations under the same circumstances.

In *Gould on Waters* (3d ed., sec. 298) it is stated:

> A person may lawfully collect water by means of a dam, or in ditches, canals, culverts or pipes, and is not liable in such a case for injuries caused by the escape of water in the absence of negligence on his own part.

In support of this doctrine many cases are cited directly in point.

In *Kinney on Irrigation and Water Rights* (Vol. III, p. 3080) the following appears:

> The owners of an irrigation canal or ditch are not liable as insurers for injuries sustained to adjoining property by seepage, leakage, or overflow from the canal or ditch, but are only liable for such injuries in case of actual negligence.

Numerous cases are cited in support of the doctrine.

In *Wiel on Water Rights in the Western States* (3d ed., p. 489) we find:

> The use by means of ditches, flumes, and similar apparatus is, of course, the most usual, and using the water in this way does not, by any means, make the appropriator an insurer of others against damage from breaking, overflow, seepage, or other escape of the water. The famous English case of *Rylands* v. *Fletcher* declared that a man builds a reservoir, or other works to hold water, at his peril. *But such is not the law in the West* The ditch owner is not liable merely because the break or escape occurred, but only if it occurred through his negligence. Negligence must be shown. [Italics ours.]
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> *Fleming* v. *Lockwood*, 36 Mont. 384, 14 L. R. A. (N. S.) 628;
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> *Jos. M. Howell* v. *Big Horn Basin Colonization Company*, 14 Wyo. 14, 1 L. R. A. (N. S.) 596;

King v. *Miles City Iron Ditch Company*, 16 Mont. 463, 41 Pac. 431;

Burt v. *Farmers' Coop. Irr. Co.* (Idaho, 1917) 168 Pac. 1078;

Wolf v. *St. Louis Independent Water Co.*, 10 Cal. 541;

Everett et al. v. *The Hydraulic Flume Tunnel Co.*, 23 Cal. 225;

Campbell v. *Bear River, etc., Co.*, 35 Cal. 679.

In Colorado, one of our States where irrigation by canals is employed extensively, a statute is in force which requires ditch companies "to keep their ditches in good condition so that the water shall not be allowed to escape from the same to the injury of any mining claim, road, ditch, or other property."

The court, citing this statute in *North Sterling Irrigation District* v. *Dickman*, 59 Colo. 169, 149 Pac. 97, held that "the owner of a ditch is not liable for damages as the result of water seeping therefrom unless it appears that such seepage was caused by the negligent construction or operation of the ditch."

See also:

Bridgford v. *Colo. Fuel & Iron Co.* (Colo. 1917) 167 Pac. 963.

The North Sterling Irr. Dist. v. *Gehrig*, 27 Colo. App. 551.

As was aptly said in *Middelkamp* v. *Bessemer Irr. Co.* 46 Colo. 102, 115, 103 Pac. 280, where plaintiff, as in the cases at bar, sought to hold a canal company liable for damages for seepage from its canal:

> We do not think it was the intention of the framers of our Constitution to place such an

> extraordinary burden upon a class of enterprises so vital to the future development and prosperity of our State; for by reason of conditions existing in this arid region the construction of irrigation canals was always deemed of paramount importance.

In a note to the case of *Brennan Construction Co.* v. *Cumberland* (29 App. D. C. 554), reported in 15 L. R. A. (N. S.) 535, 541, the following summary is given:

> The doctrine of *Rylands* v. *Fletcher* has been applied in one case in each of the following States: Ohio, Texas, California, Illinois, and New York, but the contrary was held in other cases in Texas and in a case in the Supreme Court of Illinois, and the weight of authority in California and New York is that the defendant is not liable in the absence of negligence. This latter rule appears to accord with the American rule on the subject in regard to damages caused by water escaping from defendant's premises or pipes.

And this appears on the following page (542):

> The weight of authority in this country is that the defendant maintaining a water ditch or tank, or operating and using water pipes, will not be liable for damages caused to others from the escape of the water from his premises in the absence of negligence.

Is the United States, when it enters upon great public improvements for the common benefit of all the people, in a worse position than a private corporation or citizen?

This court has answered the question in *Bedford* v. *U. S.*, 192 U. S. 217, 223:

> Is only the Government so restrained? Why not as well riparian proprietors; are they also forbidden to resist natural causes, whatever devastation by floods or erosion threaten their property? Why, for instance, would not, under the principle asserted, the appellants have had a cause of action against the owner of the land at the cut-off if he had constructed the revetment? And if the Government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. * * * Conceding the power of the Government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility.

The same idea was expressed in *Jackson* v. *U. S.*, 230 U. S. 1, 21–22:

> Would it be said that the claimants would have a resulting right of action in damages because other owners had exerted the very right which the claimants had previously resorted to for the purpose of protecting their own land? If not, upon what imaginary ground can it be said that because a work which was lawful in and of itself was done by the United States, therefore responsibility in favor of the claimants was entailed?

VI.

Claimants had no vested right in the soda accretions from the ground waters of that vast section, nor in the maintenance of a certain density of the water entering the lakes, nor in the maintenance of the then existing ground-water level in the valley where the lakes are located.

The testimony shows that the soda obtained from the Soda Lakes was derived from accretions of the underground waters of that section. (26, 55, 751; Russell's Monograph, p. 75; Deft's Ex. Clark No. 6.)

Lyons v. *U. S.*, 26 Ct. Cls. 31, 45, is a case where claimant asks damages because the work of the Government in Rock Creek Park caused the water in the stream to flow by claimant's land more rapidly, and the sands which had theretofore been deposited on his land were carried past. He had been deriving a steady income from this sand, just as claimants allege they have been deriving from the soda in the lakes. The augmented waters in each case disturbed the supply. This court in the Lyons case aptly said:

> We are of the opinion that the use by the Government of the stream does not injure plaintiff in any tangible property right.

This case was quoted from at length in *Cohen* v. *U. S.*, 162 Fed. 364, 371, where the court held that a claimant had no vested right in the gravel which the Government work in a stream had prevented thereafter washing down on claimant's land.

And, of course, claimants, in the case at bar, had no vested right in the maintenance of the then existing ground-water level of that vast area, nor in the maintenance of any particular density of any solution of soda which might have been entering the lakes.

As the rights of riparian proprietors are subject to the legitimate development of the stream, so is the right of claimants to their soda manufacture subject to the legitimate development of that great valley.

VII.

One remaining point is left for discussion. If this court fail to sustain my contentions as hereinbefore advanced, yet, in the case of the Natron Soda Company, it would nevertheless be obliged to sustain the decision of the Court of Claims, for the very obvious and as it seems to me inescapable reason that the plaintiff in that case, through its predecessors in title, consented to the acts of the Government for which it now claims, and indeed expressly released the Government "from all claims for damages for entry, survey, or construction of such works."

The plaintiff having consented to the construction of the canals and granted the defendants a right of way through his lands for the construction of the canal is estopped from any right of a recovery in the absence of negligence. This was a voluntary act on the part of the plaintiff and he can not recover for the loss of other property which may have been damaged by the construction of the work to which he agreed.

In *Daniels* v. *St. Francis Levee District*, 84 Ark. 333, 105 S. W. 578, plaintiff sought to recover damages for seepage on his land from defendant's levee. The plaintiff, however, had granted to defendant a right of way through his land for the construction of the levee. The court held that a landowner who consents to the construction of a levee and grants a right of way over his land for that purpose cannot complain of any damage to the land resulting from the construction and maintenance of the leveein a skillful manner. Any damage resulting therefrom being presumed to have been compensated for by the consideration paid for the conveyance, and quoting from another case, the court said:

> No man can maintain an action for a wrong where he has consented to the act which occasions his loss. * * * The execution of the conveyance placed the parties in the same relative situation, and gave to each precisely the same rights as if the railroad company had caused the land to be condemned for the right-of-way and had paid the award of damages. In either case the company is authorized to do whatever is lawful in the construction and management of its road; and the owner's claim for injury to the rest of his land is released, except as it arises from faulty construction.

In Lewis on Eminent Domain (3rd Ed.), section 474, we find:

> The conveyance of land for a public purpose will ordinarily vest in the grantee the same

> rights as though the land had been acquired by condemnation. The conveyance will be held to be a release of all damages which would be presumed to be included in the award of damages if the property had been condemned. The grantor therefore can not recover for any damages to the remainder of his land which result from a proper construction, use and operation of works upon the property conveyed.

See also *Wallace* v. *Columbia, etc., R. R. Co.*, 34 S. C. 62, where plaintiff granted the defendant a right of way over his land and the defendant erected an embankment which obstructed a stream, causing it to flood plaintiff's property, the court held the defendant was not liable, as there was no showing of negligence presented.

In *Nunnamaker* v. *Water Power Company*, 47 S. C. 485, 25 S. E. 75, where plaintiff had granted defendant the right to flood some land and the balance was damaged, the court said (p. 487):

> It would be unreasonable to hold that a voluntary grant of a right of way is not as effectual to protect the grantee from suit for damages arising from its proper use, as a right of way taken under compulsory proceedings. *This which is settled law as to railroads applies on principle to canals as well.* * * * The plaintiff, having seen fit to grant license to permanently flood a part of his tract of land for the maintenance of the canal, is presumed to have taken into consideration the damage to the residue of his tract, which would accrue

> to him from the proper and reasonable use of the right granted. If for such use he did not get adequate compensation in the price paid for the grant or license, and greater injury than he contemplated has resulted from such reasonable use, it is damnum absque injuria.

If, therefore, the predecessors in title of the Natron Soda Company had only deeded the right of way to the Government for the construction of its canal, without more, it would have acquiesced; and there can be no implied contract to compensate for the alleged "taking." But they did more. They expressly released the Government from any such claim for damages as then successor in title is now making. In the motion to remand, it is claimed that the agreement was without consideration, but the contract especially provides that the release was made "in consideration of the benefits to be hereafter derived from the construction of irrigation works through or in the vicinity of the lands hereinafter described." (*Ante*, p. 4.) *How, then, can it be regarded as a nudum pactum?*

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

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